No. 04-1186

In The Supreme Court of the United States

WACHOVIA BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

DANIEL G. SCHMIDT, III, *et al.*,

Respondents.

ON PETITION FOR WRIT OF CERTIORARI
TO THE UNITED STATES COURT OF APPEALS
FOR THE FOURTH CIRCUIT

RESPONDENTS' BRIEF ON THE MERITS

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QUESTION PRESENTED

Whether a United States District Court has diversity jurisdiction over a national bank which maintains branch offices in the forum state, when 28 U.S.C. § 1348, the statute setting out jurisdiction, provides national banking associations are "deemed citizens of the states in which they are respectively located."

TABLE OF CONTENTS

PAGE

QUESTION PRESENTED i

TABLE OF CONTENTS ii

TABLE OF AUTHORITIES vii

STATEMENT OF THE CASE 1

SUMMARY OF THE ARGUMENT 2

ARGUMENT 7

I. THE PLAIN MEANING OF THE STATUTE GOVERNING JURISDICTION OVER NATIONAL BANKS DEMONSTRATES THAT A NATIONAL BANK IS DEEMED TO BE A CITIZEN OF EVERY STATE IN WHICH IT OPERATES A BRANCH OFFICE. 7

A. The Jurisdiction Of The Federal Courts Over National Banking Associations Is A Congressional Decision. 7

B. Under The Principles Of Statutory Construction, The Courts Must Apply The Plain Meaning Of The Statute. 8

1. The Plain Meaning Of The Key Words Shows That "Located" Means Wherever A National Banking Association Maintains A Branch Office. 9

a. "Located" Means Physical Presence. 9

b. Physical Presence Is Not Limited To One Location. 11

c. A National Bank Becomes Physically Present In A State Through A Branch Bank. 13

2. The Use of the Modifier "Respectively" In § 1348 Does Not Indicate That A National Bank's Location Must Be Limited To One Place. 14

3. Viewed As A Whole, The Statute Makes Clear That "Located" Must Mean Something Different From "Established." 15

a. The Different Terms "Located" And "Established," Both Used In § 1348, Must Be Given Different Meanings. 15

b. A Comparison Of § 1348 And § 1332 Shows The Different Terms Must Be Given Different Meanings. 19

4. The Same Terms In Different Statutes Must Be Given The Same Meaning. 21

5. The Doctrine Of *In Pari Materia* Resolves The Issue. 23

a. The Two Terms Deal With the Same Subject Matter. 24

b. The Two Terms Originated From The Same Statutes. 25

II. EVEN IF THE STATUTE IS CONSIDERED TO BE AMBIGUOUS, THE LEGISLATIVE HISTORY DEMONSTRATES THAT A NATIONAL BANK MAY BE DEEMED A CITIZEN IN ANY STATE IN WHICH IT OPERATES A BRANCH OFFICE. 26

A. The Early Statutes Used The Words "Established" And "Located" Differently. 26

B. The Meaning Of These Two Terms Continued Into The Present Statute. 30

C. The Opinion Of The Court Of Appeals Below Was Not Mistaken Concerning The Possibility Of Interstate Branch Banks. 32

D. The Doctrine Of "Jurisdictional Parity" Does Not Require That National Banks Must Be Deemed Citizens Of Only One State. 33

E. A Policy Of "Equality Of Competition" Does Not Require That National Banks Must Be Deemed Citizens Of Only One State. 37

F. The Re-enactment Of The Statute After A Single Court Decision Does Not Require A Conclusion That Congress Meant To Incorporate The Holding Of That Case. 40

G. The Concept Of Citizenship Does Not Require A National Bank To Be Deemed A Citizen Of Only One State. 44

CONCLUSION 46

TABLE OF AUTHORITIES

PAGE(S)

CASES

Albemarle Paper Co. v. Moody,
422 U.S. 405 (1975) 41

American Surety Co. v. Bank of California,
133 F.2d 160 (9th Cir. 1943)..... 32, 40, 43

Bates v. U.S.,
522 U.S. 23 (1997) 16

Belleville Catering Co. v.
Champaign Market Place, L.L.C.,
350 F.3d 691 (7th Cir. 2003)..... 45

Benner v. Wichman,
874 P.2d 949 (Alaska 1994) 24

Bragdon v. Abbott,
524 U.S. 624 (1998) 42

C.I.R. v. Lundy,
516 U.S. 235 (1996) 21

Carden v. Arkoma Associates,
494 U.S. 185 (1990) 45

Central Bank of Denver, N.A. v.
First Interstate Bank of Denver, N.A.,
511 U.S. 164 (1994) 42

Citizens and S. Nat'l Bank v. Bougas,
434 U.S. 35 (1977) ..... *passim*

Continental Nat'l Bank of Memphis v. Buford,
191 U.S. 119 (1903) 35

Deal v. U.S.,
508 U.S. 129 (1993) 19

FDIC v. Meyer,
510 U.S. 471 (1994) 9

Federal Intermediate Credit Bank at Columbia S.C. v. Mitchell,
277 U.S. 213 (1928) 31

First National Bank in Plant City v. Dickinson,
396 U.S. 122 (1969) 37, 38

First National Bank of Logan v. Walker Bank,
385 U.S. 252 (1966) 37, 38

Firstar Bank N.A. v. Faul,
253 F.3d 982 (7th Cir. 2001) 42

Freytag v. C.I.R.,
501 U.S. 868 (1991) 9

Frontier Ins. Co. v. MTN Owner Trust,
111 F. Supp. 2d 376 (S.D.N.Y. 2000) 42

GMAC Commercial Credit LLC v. Dillard Dept. Stores, Inc.,
357 F.3d 827 (8th Cir. 2004) 45

Guarantee Title & Trust Co. v.
Title Guaranty & Surety Co.,
224 U.S. 152 (1912) 16

Gustafson v. Alloyd Co., Inc.,
513 U.S. 561 (1995) 21

Hallenbeck v. Pennsylvania Mut. Life Ins. Co.,
323 F.2d 566 (4th Cir. 1963) 25

Herrmann v. Edwards,
238 U.S. 107 (1915) 29, 31

Hughes Aircraft Co. v. Jacobson,
525 U.S. 432 (1999) 9

I.B.P.O. Elks of World v.
Grand Lodge I.B.P.O. Elks of World, Inc.,
50 F.2d 860 (4th Cir. 1931) 12

Jacobson v. New York, N.H. & H.R. Co.,
206 F.2d 153 (1st Cir. 1953) 12

King v. St. Vincent's Hosp.,
502 U.S. 215 (1991) 19

Leather Manufacturers' Nat. Bank v. Cooper,
120 U.S. 778 (1887) 34

Lewis v. Fidelity & Deposit Co. of Maryland,
292 U.S. 559 (1934) 37, 38

Lexecon, Inc. v.
Milberg Weiss Bershad Hynes & Lerach, *Deal v. U.S.*,
523 U.S. 26 (1998) 19

Lorrilard v. Pons,
434 U.S. 575 (1978) 41

Louisville New Albany & Chicago Ry. Co. v.
Louisville Trust Co.,
174 U.S. 552 (1899) 11, 12, 36

McCoy v. Siler,
205 F.2d 498 (3rd Cir. 1953) 12

Memphis & C.R. Co. v. Alabama,
107 U.S. 581 (1882) 12

Mercantile Nat'l Bank at Dallas v. Langdeau,
371 U.S. 555 (1963) 34

National Lead Co., v. United States,
252 U.S. 140 (1920) 41

NLRB v. Gullett Gin Co., Inc.,
340 U.S. 361 (1951) 41

Norfolk and Western Ry. Co. v.
American Train Dispatchers Ass'n,
499 U.S. 117 (1991) 9

Ohio & Mississippi R.R. Co. v. Wheeler,
66 U.S. 286 (1861) 12

Oscar Mayer & Co. v. Evans,
441 U.S. 750 (1979) 23

Panalpina Welttransport GmBh v. Geosource, Inc.,
764 F.2d 352 (5th Cir. 1985) 12, 36

Petri v. Commercial Nat'l Bank of Chicago,
142 U.S. 644 (1892) ..... *passim*

Pierce v. Underwood,
487 U.S. 552 (1988) 42

Radzanower v. Touche Ross & Co.,
426 U.S. 148 (1976) 17

Robinson v. Shell Oil Co.,
519 U.S. 337 (1997) 19

Rolling Greens MHP, L.P. v.
Comcast SCH Holding L.L.C.,
374 F.3d 1020 (11th Cir. 2004) 45

Rubin v. United States,
449 U.S. 424 (1981) 9

Salinas v. U.S.,
522 U.S. 52 (1997) 9

Security Mills of Asheville, Inc. v.
Wachovia Bank & Trust Co., N.A.,
281 N.C. 525, 189 S.E.2d 266 (1972) 11

Simpson v. Union Oil Co. of Cal.,
377 U.S. 13 (1964) 25

Southland Gasoline Co. v. Bayley,
319 U.S. 44 (1943) 24

Stafford v. Briggs,
444 U.S. 527 (1980) 24

State ex rel. Johnson v. Boyd,
217 Ind. 348, 28 N.E.2d 256 (1940) 14

State v. Gaughan,
124 Ark. 548, 187 S.W.2d 918 (1916) 14

United States v. Srnsky,
271 F.3d 595 (4th Cir. 2001) 23

United States v. Stewart,
311 U.S. 60, 61 (1940) 23

Weeks v. Thompson,
66 Ohio App. 1, 31 N.E.2d 454 (2 Dist. 1940) 14

White v. Lambert,
370 F.3d 1002 (9th Cir. 2004) 16

Williams v. Taylor,
529 U.S. 420 (2000) 22

Wolf v. Lake Erie & W.R. Co.,
55 Ohio St. 517, 45 N.E. 708 (1896) 14

World Trade Center Properties, LLC v. Hartford Fire Ins. Co.,
345 F.3d 154 (2nd Cir. 2003) 42

STATUTES

12 U.S.C. § 22 17

12 U.S.C. § 30(b) 18

12 U.S.C. § 36(i) 18

12 U.S.C. § 92 13

12 U.S.C. § 94 ..... 22, 25, 26

28 U.S.C. § 1332 ..... *passim*

28 U.S.C. § 1332(c)(1) 13, 19

28 U.S.C. § 1348 ..... *passim*

28 U.S.C. § 1394 27-28

Rev. Stat. § 1598 22

OTHER AUTHORITIES

2 U.S. Code Cong. & Admin. News, 1958 13

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73 Am. Jur.2d *Statutes*, §105, p. 316 (2001)..... 24

Act of 1864, ch. 106, 13 Stat. 99..... 27

Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 316, 320 22

Act of July 12, 1882 ch. 290, 22 Stat. at L. 162, Comp. Stat. 1913, § 9665..... *passim*

Act of June 3, 1864, ch. 106, 13 Stat. 116..... 26, 27

Act of Mar. 3, 1865, ch. 78, § 7, 13 Stat. 459 33

Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 552 ..... *passim*

Act of Mar. 3, 1911 ch. 231, § 291, 36 Stat. 1167 26

Act of Mar. 3, 1911, ch. 2, Pub. L. 61-475, § 24, 36 Stat. 1087..... 26

Black's Law Dictionary 940 (6th ed. 1990)..... 10

Black's Law Dictionary 958 (8th ed. 2004)..... 9

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McFadden Act, 44 Stat. Pt 2, p. 1224 (1927)..... 32

Sen. Rep. No. 1830, 85th Cong., 2d Sess. (1958)..... 13

Webster's New Twentieth Century Dictionary 1327 (2nd ed. 1983) 14

Webster's Third New International Dictionary 1327 (1993) 9, 18

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STATEMENT OF THE CASE

The suit underlying this appeal arose from financial services provided by the Petitioner to the Respondents. Before 1998, Wachovia Bank provided personal and business banking services to Daniel Schmidt. Following the sale of Schmidt's businesses in May 1998, Wachovia continued to manage substantial sums received from that sale. Because of this existing relationship, Wachovia approached Schmidt about his potential exposure to significant capital gains tax liability, and advised him that the bank could provide an investment strategy which offered a substantial investment return and in addition would shelter the tax liability he was facing from the sale of his business.

In 1998, while acting as tax and financial advisors to the Respondents, Wachovia, along with KPMG, LLP and others persuaded Respondents to purchase an investment strategy known as a Foreign Leveraged Investment Program ("FLIP") which allegedly provided a so-called "basis shift" to shelter capital gains. The safety of this strategy was misrepresented and its risks were never revealed. As a result, the Respondents suffered losses.

The Respondents brought suit in 2003 in the South Carolina Court of Common Pleas against the Petitioner, KPMG and others for actions arising out of the consulting services performed for the Respondents by the Petitioner and others. The Respondents sued for declaratory relief and for damages resulting from civil conspiracy, fraud, constructive fraud, negligent misrepresentation, promissory estoppel, breach of

fiduciary duties, aiding and abetting, and violations of the South Carolina Unfair Trade Practices Act. The Respondents have since resolved their claims against all of the other defendants in the state court action except the Petitioner.

On the basis of diversity jurisdiction and provisions of the Federal Arbitration Act, Petitioner commenced a federal court proceeding by filing a petition to compel arbitration in the United States District Court for the District of South Carolina. KPMG and the remaining defendants in the state court case filed their motions to compel arbitration in the state court which were denied by the state court judge.

On August 1, 2003, the United States District Court also denied the Petitioner's arbitration petition. The Petitioner appealed this decision to the Fourth Circuit Court of Appeals. The Fourth Circuit, however, did not rule on the arbitration issue. Instead, it decided that the District Court lacked subject matter jurisdiction over the matter. The Fourth Circuit Court of Appeals held the Petitioner is a citizen of the state of South Carolina under 28 U.S.C. § 1348, because it maintains branch offices which are "located" in that state. Since the Respondents are also citizens of South Carolina, the court of appeals concluded that diversity jurisdiction was lacking.

SUMMARY OF THE ARGUMENT

It is undisputed this case may be removed to federal court only if the court has jurisdiction by virtue of the diversity of citizenship of the parties. The statute

which governs jurisdiction over national banking associations provides that they shall "be deemed citizens of the States in which they are respectively located." 28 U.S.C. § 1348.

The meaning of the statute is a matter of statutory interpretation. Under the first principle of statutory interpretation, the plain meaning of the term "located" is anywhere a national bank has a physical presence, such as in a branch banking office. Nothing in the statute suggests that "located" must be confined to only one place. The fact corporations may have multiple citizenship for jurisdiction purposes further suggests no intent to limit the citizenship of a national bank to only one state.

Under the rule of construction that different words in the same statute are intended to have different meanings, the plain meaning of the statute as a whole indicates that the meaning of "located" is different from the meaning of "established" which is used in the first part of the statute. In contrast to the plain meaning of "located" as referring to a bank's physical presence, the word "established," as used in the statute, means where a national bank is designated in its organizational certificate.

Section 1348 may also be read in conjunction with 28 U.S.C. § 1332, governing diversity jurisdiction, which was enacted as part of the same legislation in 1948 as § 1348. Section 1332, was amended in 1958 to include diversity jurisdiction over corporations. The fact that this provision used language markedly different from the terms used in § 1348 further

indicates a congressional intent that they have a different meaning.

That meaning is supplied from the further rule of statutory construction that the same terms in a different statute must be given the same meaning. The statute which governed venue over national banks was in effect at the time § 1348 was enacted. As the venue statute used very similar language to that used in § 1348, then the meaning applied to the terms in the venue statute must likewise be applied to § 1348.

The meaning of those terms was established in *Citizens and S. Nat'l Bank v. Bougas*, 434 U.S. 35 (1977), where this Court held "located" means any place a national bank operates a branch office. The doctrine of *in pari materia* also applies to define "located," as used in § 1348, in the same manner that the *Bougas* Court defined it in the venue statute. This follows from the fact the two statutes deal with the same subject matter and share a common legislative origin.

Beyond the plain meaning of the unambiguous terms of § 1348, the statutory history reveals that the terms "located" and "established" have separate meanings. Indeed, the early statutes suggest that "located" has connotations, at least, of where a national bank is "doing business." These meanings remained unchanged into the enactment of the current § 1348. Thus, the legislative history supports the conclusion that a national bank is a citizen of every state in which it operates a branch office.

Nor does the legislative history suggest that Congress was unaware of the possibility of interstate branch banking when it enacted § 1348. By merger, for example, interstate branch banking was permitted before § 1348 was enacted. The fact that it was not widespread does not mean that Congress must have meant § 1348 to limit a national bank's citizenship to a single state.

The conclusion that a national bank is a citizen of every state in which it operates a branch office is not disturbed by the application of the doctrine of jurisdictional parity. Jurisdictional parity derives from the removal of federal question jurisdiction which had originally applied to national banks by virtue of their federal character, leaving them in jurisdictional parity with state banks. A careful reading of the decisions reveals that the removal of broad federal question jurisdiction did not at the same time enlarge the courts' diversity jurisdiction over national banks.

Nor does the policy of "equality of competition" require that a national bank's citizenship be limited to one state. The cases recognizing the policy addressed fairness in business competition between national and state banks. They did not extend the policy to include equal results in court procedures. Moreover, the policy advocated by the Petitioner would, itself, produce inequalities.

Nor does the enactment of § 1348, a few years after a single appeals court decision, imply that § 1348 was intended to incorporate the holding from that case. The rule of construction is limited to the enactment of

legislation after the meaning of a term has been consistently applied or settled. One case on the point did not settle the meaning of the word "located."

Finally, the concept of citizenship does not require that a national bank be deemed a citizen of only one state. By analogy, corporations are expressly allowed, in the statute governing diversity jurisdiction over them, to be citizens of more than one state. Any further analogy between corporations and national banks is weakened by the very different language employed in the statute governing jurisdiction over corporations from that used in § 1348.

ARGUMENT

I. THE PLAIN MEANING OF THE STATUTE GOVERNING JURISDICTION OVER NATIONAL BANKS DEMONSTRATES THAT A NATIONAL BANK IS DEEMED TO BE A CITIZEN OF EVERY STATE IN WHICH IT OPERATES A BRANCH OFFICE.

A. The Jurisdiction Of The Federal Courts Over National Banking Associations Is A Congressional Decision.

Congress sets the subject matter jurisdiction of the lower federal courts. For national banking associations, the statute permits subject matter jurisdiction through both the involvement of a federal question and diversity of citizenship. The statute states as follows:

> The district courts shall have original jurisdiction of any civil action commenced by the United States, or by direction of any officer thereof, against any national banking association, any civil action to wind up the affairs of any such association, and any action by a banking association *established* in the district for which the court is held, under chapter 2 of Title 12, to enjoin the Comptroller of the Currency, or any receiver acting under his direction, as provided by such chapter.

> All national banking associations shall, for purposes of all other actions by or against them, be deemed citizens of the States in which they are respectively *located*.

28 U.S.C. § 1348 (emphasis added). In the first paragraph, federal question jurisdiction is retained over certain, limited types of actions. The second paragraph covers all other cases, permitting jurisdiction on the basis of diversity of citizenship over national banks by deeming them to be citizens of the states in which they are respectively located.

In the case at hand, the first paragraph does not apply. The suit brought here fits none of the categories set out. Whether jurisdiction is available under the second paragraph depends on whether the Petitioner is "located" in South Carolina. It is undisputed that the Petitioner has its principal place of business in another state. It is also undisputed that it maintains branch banking offices in South Carolina. If maintaining branch offices means that it is "located" in South Carolina, then it is deemed a citizen of that state. Diversity jurisdiction would, then, be defeated, since the Respondents are also citizens of South Carolina.

B. Under The Principles Of Statutory Construction, The Courts Must Apply The Plain Meaning Of The Statute.

The meaning of § 1348 is a question of statutory construction. The first principle of statutory construction is that the words of a statute should be

given their plain and ordinary meaning. *Rubin v. United States*, 449 U.S. 424 (1981); *Hughes Aircraft Co. v. Jacobson*, 525 U.S. 432, 438 (1999). Where the statute does not provide an express definition of the term in question, the courts construe the term in accordance with its ordinary or natural meaning. *See FDIC v. Meyer*, 510 U.S. 471 (1994).

The courts must give effect to the unambiguously expressed intent of Congress. *Norfolk and Western Ry. Co. v. American Train Dispatchers Ass'n*, 499 U.S. 117 (1991). When a court finds the terms of a statute to be unambiguous, the judicial inquiry should be complete. *Freytag v. C.I.R.*, 501 U.S. 868 (1991). For a statute to be unambiguous, it need only be plain to anyone reading the Act that the statute encompasses the conduct at issue. *Salinas v. U.S.*, 522 U.S. 52 (1997).

1. The Plain Meaning Of The Key Words Shows That "Located" Means Wherever A National Banking Association Maintains A Branch Office.

a. "Located" Means Physical Presence.

The word "located" is a general term referring to physical presence in a place. *See e.g., Webster's Third New International Dictionary* 1327 (1993) (defining "locate" as "to set or establish in a particular spot or position," and "location" as "a position or site occupied or available for occupancy."); *Black's Law Dictionary* 958 (8th ed. 2004) (defining "location" as '[t]he specific place or position of a person or thing"). This was equally

true in 1948, when § 1348 was enacted, and in 1887, when the phrase "citizens of the States in which they are respectively located" was first used in the predecessor statute to § 1348. *See* Act of Mar. 3, 1887, ch. 373, § 4, 24 Stat. 552, 554-55 ("the 1887 Act"). *See e.g., Black's Law Dictionary* 1089 (4th ed. 1968) (defining "location" as "site or place"); 8 *Oxford English Dictionary* 1081 (2nd ed. 1989) (defining "locate" as "[t]o fix or establish in a place; to settle; *pass.* to be settled, stationed, or situated," and providing examples of usage from 1807 through 1896 that universally involve physical presence in a place). Moreover, the sixth edition of *Black's Law Dictionary*, one of the few sources to consider the past participle "located" separately as a general legal term, emphasizes the connotation of physical presence. *Black's Law Dictionary* 940 (6th ed. 1990) (defining "located" separately as "[h]aving physical presence or existence in a place") . In one case cited by the *Bougas* Court, it was pointed out,

> Another definition of "locate" given by Webster's New International Dictionary, Second Edition, is "to search for and discover the position of; as to Locate an enemy; to Locate a fire." This element of discovery, inherent in the word 'locate' but not in the word 'establish,' appears to have been in the mind of the Court in *Lapinsohn v. Lewis Charles, Inc.*, 212 Pa. Super. 185, 240 A.2d 90, cert. den. *First Camden National Bank & Trust Co. v. Lapinsohn*, 393 U.S. 952, 89 S.Ct. 376, 21 L.Ed.2d 363, when it said a national bank by setting up a branch to conduct a

> general banking business, manifested an intent "to be found" in that jurisdiction and so had waived its statutory immunity to suit there.

Security Mills of Asheville, Inc. v. Wachovia Bank & Trust Co., N.A., 281 N.C. 525, 189 S.E.2d 266 (1972) (cited in *Bougas*, *supra*, 434 U.S. at 40). Accordingly, under the ordinary meaning of the word, "located" means wherever a national bank has a physical presence.

b. Physical Presence Is Not Limited To One Location.

The Petitioner suggests that the word "located" is ambiguous as between any physical presence, and a single, unique physical presence. This supposed ambiguity, however, is not found in the ordinary meaning of the term. Nothing in the definitions requires the physical presence to be unique or to exclude other distinct locations.

As part of the reason that "located" may not mean any physical presence, the Petitioner argues that national banks are analogous to corporations. Corporations, however, may be incorporated in more than one state. As stated in *Louisville New Albany & Chicago Ry. Co. v. Louisville Trust Co.*, 174 U.S. 552 (1899),

> This court has often recognized that a corporation of one State may be made a corporation of another State by the legislature of that State, in regard to

> property and acts within its territorial jurisdiction.

Id. at 562 (citing *inter alia Ohio & Mississippi R.R. Co. v. Wheeler*, 66 U.S. 286 (1861)). On this same point the Fifth Circuit said,

> Through multiple places of incorporation, principal place of business and alter ego or consolidation doctrines, a corporation may become the citizen of several places for purposes of diversity jurisdiction. Such a result is in keeping with Congress' intendment to constrict the availability of diversity jurisdiction.

Panalpina Welttransport GmBh v. Geosource, Inc., 764 F.2d 352, 354 (5th Cir. 1985).[1] Consequently, even with particular reference to its effect on diversity

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[1] *See also* 8 William Meade Fletcher, *Cyclopedia of the Law of Corporations* § 4031, p. 417 (Perm. ed. 2001) (corporation incorporated in more than one state becomes a citizen of each state of incorporation) (citing *Memphis & C.R. Co. v. Alabama*, 107 U.S. 581 (1882); *I.B.P.O. Elks of World v. Grand Lodge I.B.P.O. Elks of World, Inc.*, 50 F.2d 860 (4th Cir. 1931)). As the court stated in *I.B.P.O. Elks*, "[t]hat the same persons may incorporate under the same name in two or more states is too well settled to admit of discussion." *Id*. at 862. *See also Jacobson v. New York, N.H. & H.R. Co.*, 206 F.2d 153 (1st Cir. 1953), affirming *per curiam* without an opinion the decision of the First Circuit in which the court was held to lack diversity jurisdiction over a corporation incorporated under the laws of both Connecticut and Massachusetts. In that case, the court of appeals noted that "[t]he only policy consideration which is apparent is that we should not be astute to widen federal diversity jurisdiction." *Id*. at 155 (quoting *McCoy v. Siler*, 205 F.2d 498 (3rd Cir. 1953)).

jurisdiction, corporations may be incorporated in, and, thus, citizens of more than one state.[2] As a result, nothing in the diversity jurisdiction over corporations requires that a national bank may not be a citizen of more than one state.

c. A National Bank Becomes Physically Present In A State Through A Branch Bank.

As the court of appeals below pointed out, it is indisputable that a national bank becomes physically present in a state when it opens branch offices in that state and conducts business there. The Petitioner never challenges this statement. For example, under 12 U.S.C. § 92, any national bank is authorized to operate as an insurance business in any place in which it is "located and doing business." It follows that within the ordinary meaning of the word, that a national bank is "located" where it is doing business. This is very different from the Petitioner's conclusion that a bank is located only where it is so designated in its organizational certificate.

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[2] Where a corporation was incorporated in more than one state, the "forum doctrine" sometimes applied to deem the corporation a citizen only of the state of the forum. The adoption of § 1332, however, has cast doubt on this doctrine. *See* Wright, Miller & Cooper, Federal Practice and Procedure: Jurisdiction 2d § 3626, p. 655 (2d ed. 1984) (arguing that the doctrine should be discarded because of § 1332(c)(1)). On this point, Wright and Miller refer to the "overriding purpose" of § 1332 to limit diversity jurisdiction. *Id*. at p. 656 (citing Sen. Rep. No. 1830, 85th Cong., 2d Sess. (1958), reprinted in 2 U.S. Code Cong. & Admin. News, 1958, p. 3099).

2. The Use of the Modifier "Respectively" In § 1348 Does Not Indicate That A National Bank's Location Must Be Limited To One Place.

Section 1348 addresses national banking associations in the plural. It says that they "shall . . . be deemed citizens of the states in which they are respectively located." On its face, this suggests that banks may be citizens of more than one state.

The word "respectively" is variously defined. The dictionary definition of "respectively" is given as "in the order named or mentioned." *See e.g., Webster's New Twentieth Century Dictionary* 1327 (2nd ed. 1983). Several cases discussing the word have held "respectively" to mean "as relating to each." *State v. Gaughan*, 124 Ark. 548, 187 S.W.2d 918 (1916); *State ex rel. Johnson v. Boyd*, 217 Ind. 348, 28 N.E.2d 256 (1940) (same); *Weeks v. Thompson*, 66 Ohio App. 1, 31 N.E.2d 454 (2 Dist. 1940) (same). In *Wolf v. Lake Erie & W.R. Co.*, 55 Ohio St. 517, 45 N.E. 708 (1896), it was held to mean "singly or severally considered; singly in the order designated; as relating to each."

"Respectively" modifies "located" and "located" refers to banking associations. Thus, the paragraph addresses the location "as relating to each" bank, or where the banks are located, "singly or severally considered."

The effect of this is shown by considering the statute, with the word omitted from the paragraph.

Without the modifier "respectively," all banks would be deemed citizens of the states where they are located, such that any one bank would be considered a citizen of every state in which every other bank is located. The addition of the word "respectively" avoids this problem by limiting citizenship to those states in which the banks, singly and severally considered, are located. In any event, the inclusion of the word "respectively" does nothing to undermine the framing of the paragraph in the plural or to imply that a national bank may be deemed a citizen of only one state.

3. Viewed As A Whole, The Statute Makes Clear That "Located" Must Mean Something Different From "Established."

a. The Different Terms "Located" And "Established," Both Used In § 1348, Must Be Given Different Meanings.

The Petitioner argues that "located" means the same as "established." This follows, the argument goes, from the fact that, under the original laws restricting a national bank to one place of business, where it was "established" and where it was "located" were always the same place. This confuses the meaning of the words with the result. This Court answered that argument in *Citizens and S. Nat'l Bank v. Bougas*, 434 U.S. 35 (1977), dealing with the very similar venue statute, when it said:

> Throughout this early period, the words "established" and "located" led to the same ultimate venue result. Nevertheless, the two words are different. One must concede that a federal judicial district, which the statute associates with the word "established," is not the same as the geographical area that delineates the jurisdiction of a state court, which the statute associates with "located."

Id. at 43-44.

The rules of construction require that, where different words are used in different parts of the same statute, it is presumed that the words are used with a different intent. *Guarantee Title & Trust Co. v. Title Guaranty & Surety Co.*, 224 U.S. 152 (1912); *Bates v. U.S.*, 522 U.S. 23 (1997). *See also White v. Lambert*, 370 F.3d 1002, 1011 (9th Cir. 2004) ("It is axiomatic that when Congress uses different text in 'adjacent' statutes it intends that the different terms carry a different meaning.").

Thus, looking beyond the individual words, to the statute as a whole, it is clear the Petitioner's - "located" should be taken to mean the same thing as "established"- argument must fail. The argument is contrary to the rules of construction. The word "established" is used in the first paragraph of § 1348 to discuss federal question jurisdiction. The first paragraph grants the district courts jurisdiction over "any action by a banking association *established* in the

district for which the court is held" to enjoin the Comptroller of the Currency or his receiver under chapter 2 of title 12. 28 U.S.C. § 1348 (emphasis added). In the paragraph immediately following, the word "located" is used to discuss diversity jurisdiction, saying that national banks shall be "deemed citizens of the States in which they are respectively *located*." 28 U.S.C. § 1348 (emphasis added).

Moreover, a national bank can have two different kinds of presence. As the court of appeals below pointed out, a bank can have a physical presence by operating an office, and can have a designated presence, required to be shown in its organizational certificate as "where its operations of discount and deposit are to be carried on." 12 U.S.C. § 22. This is similar to the distinction made by this Court in *Bougas* that ". . . a federal judicial district, which the statute associates with the word "established," is not the same as the geographical area that delineates the jurisdiction of a state court, which the statute associates with "located." *Bougas*, 434 U.S. at 43-44. A national bank's designated presence is set out in its organizational certificate. This is very similar to a state bank's charter. Where a national bank is chartered is universally regarded as where it is "established." *Bougas*, 434 U.S. at 39. Thus "established" indicates where a national bank is designated in its certificate of organization. *See also Radzanower v. Touche Ross & Co.*, 426 U.S. 148 (1976) (the place specified in a national bank's charter as its home office is determinative of the district in which the bank is established).

Moreover, the ordinary meaning of the word "established," connotes an *original* and *permanent* location. *See e.g., Webster's Third*, at 778 (defining establish as "to place, install, or set up *in a permanent or relatively enduring* position esp. as regards living quarters, business, social life, or possession," or "to bring into existence, create, make, start, originate, found, or build usu[ally] *as permanent or with permanence in view*" (emphasis added)). A national bank is originally and permanently established at its main office, which cannot be moved more than thirty miles outside the city of its original location, and even then only with the approval of two-thirds of the shareholders and the Comptroller of the Currency. 12 U.S.C. § 30(b). Beyond that, a bank is only temporarily located at its branch offices, which it can open and move at will, subject to the approval of the Comptroller. 12 U.S.C. § 36(i).

If, as the Petitioner argues, "located" and "established" had been intended to mean the same thing, Congress could have used the same word in both parts of § 1348. The fact that it did not indicates intent that the words do not have the same meaning. This is especially true considering the connotation that the word "established" has for the place designated in a national bank's organizational certificate, when compared to the plain meaning of "located" as a place of physical presence.

b. A Comparison Of § 1348 And § 1332 Shows The Different Terms Must Be Given Different Meanings.

A statute is to be considered in all its parts when construing any one of them. *Lexecon, Inc. v. Milberg Weiss Bershad Hynes & Lerach*, 523 U.S. 26 (1998). This is a fundamental principle of statutory construction. *Deal v. U.S.*, 508 U.S. 129 (1993). The plainness or ambiguity of statutory language is determined by reference to the language itself, the specific context in which that language is used, and the broader context of the statute as a whole. *Robinson v. Shell Oil Co.*, 519 U.S. 337 (1997). *See also King v. St. Vincent's Hosp.*, 502 U.S. 215 (1991) (meaning of the language, plain or not, depends on the context).

While § 1348 deals with jurisdiction over national banking associations, § 1332(c)(1) deals with jurisdiction over corporations. 28 U.S.C. § 1332(c)(1). Both sections deal with diversity jurisdiction and speak to jurisdiction in parallel terms. In § 1332,

> a corporation shall be *deemed to be a citizen* of any State by which it has been incorporated and of the State where it has its principal place of business . . .

28 U.S.C. § 1332(c)(1) (emphasis added). In § 1348, national banks "shall . . . be *deemed citizens* of the States in which they are respectively located." 28 U.S.C. § 1348 (emphasis added). These parallel statutes, then, apply very different language.

Moreover, although § 1348 and § 1332 are codified in different sections of the Code, they originated in the same legislation. Section 1348, enacted June 25, 1948, c. 646, §1, 62 Stat. 933, was based on 28 U.S.C., 1940 ed., § 41(16) (Mar. 3, 1991, ch. 231, § 24, ¶ 16, 36 Stat. 1092). Similarly, § 1332, enacted June 8, 1948, c. 646, § 1, 62 Stat. 930, was also based on 28 U.S.C., 1940 ed., § 41(1) (Mar. 3, 1991, ch. 231, § 24, ¶ 1, 36 Stat. 1091)]. The specific provision governing diversity jurisdiction over corporations was added in 1958. July 25, 1958, P.L. 85-554, § 2, 72 Stat. 415. Nevertheless, Congress added the subsection dealing with corporations to the jurisdiction statute and applied parallel language to the jurisdictional statute governing national banks. Considering their common origins and their similar purpose and structure, the two sections must be read together.

Crucially important in this comparison is the fact that § 1332 applies very different language to corporations than the language § 1348 applies to national banks. Although both are deemed citizens of states, corporations are deemed to be citizens where they are incorporated and where they have their principal place of business. National banks, by contrast, are deemed citizens where they are "located." Again, under the principle that different terms in the same statute must be given different meanings, the term "located" under § 1348, cannot mean the same thing as "the place of incorporation or principal place of business" as used in § 1332.

This comparison further undermines the argument that there is a close analogy between

national banks and corporations for jurisdictional purposes. While it is true that a corporation's charter is similar to a national bank's organizational certificate, the very fact that § 1332 employs language so different from the word "located," indicates a clear congressional intent that national banks and corporations are to be treated differently. The Petitioner and the Comptroller argue that a corporation's citizenship under § 1332 helps to show that a national bank is "located" where it is designated in its organizational certificate. On the contrary, under the rule of construction, the use of words in § 1332, so different from those used in § 1348, shows just the opposite. The similarities between corporations and national banks only highlight the fact that the statutes treat them so differently. Viewed together, then, the statutes indicate that "located" is not intended to have the same meaning as where a national bank is designated in its certificate.

4. The Same Terms In Different Statutes Must Be Given The Same Meaning.

Just as the differences between § 1348 and § 1332 shed light on what the word "located" does not mean, the similarities between § 1348 and the statute dealing with venue over national banks reveal what "located" does mean. The rule of construction here is that identical words used in different parts of the same act are intended to have the same meaning. *Gustafson v. Alloyd Co., Inc.*, 513 U.S. 561 (1995); *C.I.R. v. Lundy*, 516 U.S. 235 (1996). Moreover, the same words used in different statutes on the same subject are ordinarily

interpreted to have the same meaning. *Williams v. Taylor*, 529 U.S. 420 (2000).

The use of the word "located" as meaning wherever a national bank operates a branch office was confirmed by this Court in *Bougas*. Applying the rules of statutory construction, the *Bougas* Court analyzed the statute which once governed venue over national banks and which contained language identical to § 1348. Under the prior version of that statute,

> Actions and proceedings against any association under this chapter may be had in any district or Territorial court of the United States held within the district in which such association may be *established*, or in any State, county, or municipal court in the county or city in which said association is *located* having jurisdiction in similar cases.

12 U.S.C. § 94 (Rev. Stat. § 1598, *as amended by* Act of Feb. 18, 1875, ch. 80, § 1, 18 Stat. 316, 320).[3]

In *Bougas*, the Court noted that the courts "appear to be unanimous in holding that a national bank . . . is "established" only in the federal district that encompasses the place specified in the bank's charter." *Id*. at 39. The Court rejected the argument that "located" could not have been intended to include branch banks because branch banks were essentially non-existent at the time the original venue statutes

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[3] Congress amended this statute in 1982 removing the language construed by the Court in *Bougas*. *See* 12 U.S.C. § 94.

were enacted in 1863 and 1864. The Court determined that "located," used in close conjunction with "established' in the same statute, must be given a different meaning: "[T]he two words are different . . . . Whatever the reason behind the distinction in the words, it does exist, and we recognize it." *Id*. at 44. Thus, the Court concluded, a national bank was located in any county where it operated a branch office. *Id.* at 38.

The principle that different terms conjunctively used in the same statute is identically applicable to the case at hand. Section 1348 uses the very same words "established" and "located," and uses them in similarly close proximity to one another and in a highly similar context. Thus, as they were held to be different in the venue statute in *Bougas*, the two words must be given their distinct meanings in the jurisdiction statute. Moreover, their meanings in the venue statute should carry over and be applied to § 1348.

5. The Doctrine Of *In Pari Materia* Resolves The Issue.

The application of the doctrine of *in pari materia* shows that "located" means anywhere a national bank has a branch office. The doctrine requires that "All acts in pari materia are to be taken together as if they were one law." *United States v. Stewart*, 311 U.S. 60, 61 (1940). The doctrine applies when two statutes adopt a single consistent vocabulary in reference to the same subject matter. *Oscar Mayer & Co. v. Evans*, 441 U.S. 750 (1979). *See also United States v. Srnsky*, 271 F.3d 595, 602 (4th Cir. 2001) (nearly identical language in adjacent

statutory subsections must be read *in pari materia*). It also applies where the statutes are part of the same scheme or plan, *Southland Gasoline Co. v. Bayley*, 319 U.S. 44 (1943), or where the provisions are part of the same act. 73 Am. Jur.2d *Statutes*, §105, p. 316 (2001). Thus, the act must be construed as a whole. *Stafford v. Briggs*, 444 U.S. 527 (1980).

The doctrine applies here because the venue statute, so thoroughly analyzed in *Bougas*, deals with the same subject matter as the jurisdiction statute under examination in the case at hand. Moreover, the venue statute was derived from the same origins, and applies nearly identical language. Therefore, the meaning ascribed to the terms "located" and "established" by the Court in *Bougas* must likewise be applied to § 1348.[4]

a. The Two Terms Deal With the Same Subject Matter.

Both statutes deal with the same or related subject matter. Like the venue statute, § 1348 uses both "established" and "located" to "refer to the presence of national banks." Although, generally, the purpose of a venue provision is to accommodate the needs of parties, while jurisdiction deals with a court's power to adjudicate a dispute, the specific statutes here show a

[4] Although, as previously noted, the venue statute was amended, subsequent amendment or repeal of a statute, however, does not render it irrelevant to *in pari materia* analysis. *See e.g., Benner v. Wichman*, 874 P.2d 949, n. 18 (Alaska 1994); *see generally* 2B *Norman J. Singer, Sutherland's Statutes and Statutory Construction* § 51.04 (6th ed. 2000).

common purpose. The purpose of the venue provision and the purpose of § 1348 is to describe the physical presence of national banks to determine their capacity for, and amenability to, suit in federal court. On this point it must be remembered that the doctrine does not require a perfect identity between the statutes. *Simpson v. Union Oil Co. of Cal.*, 377 U.S. 13 (1964); *Hallenbeck v. Pennsylvania Mut. Life Ins. Co.*, 323 F.2d 566, 571 (4th Cir. 1963) ("relate to same persons or things, or same class of persons or things, or have a common purpose . . . "). The Petitioner argues that, although both statutes have the same subject matter, the doctrine does not apply because the statutes have different purposes. As the court of appeals below discussed, the cases cited do not support this contention. *See* Pet. App. 14a-16a. Moreover, the Petitioner never explains how the purpose of the venue provision to promote the convenience of the parties makes the meaning of "located" different in that statute from its meaning in the jurisdiction statute.

b. The Two Terms Originated From The Same Statutes.

Not only do both statutes deal with the same subject matter, they are derived from the same statutes. The venue statute originated from the same legislation dealing with national banks as § 1348. In 1948 when Congress enacted § 1348, it used the same terms as it had used in 12 U.S.C. § 94, dealing with venue over national banks. Moreover, the 1948 enactments grew out of the 1911 codification where Congress legislated the precursors to the venue and jurisdiction statutes. The jurisdiction provision is found at Act of Mar. 3,

1911, Pub. L. 61-475, § 24, 36 Stat. 1087, 1092-1093, ch. 2 (1911). The venue provision was codified by Act of Mar. 3, 1911 ch. 231, § 291, 36 Stat. 1167.

The venue and jurisdiction provisions are joined even further back. The venue statute, 12 U.S.C. § 94, was originally § 57 of Act of June 3, 1864, ch. 106, 13 Stat. 116. This same 1864 Act was cited by this Court in *Petri v. Commercial Nat'l Bank of Chicago*, 142 U.S. 644 (1892), as the original basis of jurisdiction over national banks in federal and state court. *Petri*, *supra*, 142 U.S. at 647. Because of this common origin, the doctrine applies to construe § 1348 in the same terms as the venue statute. The terms of the venue statute were given their definitive meaning by the Court in *Bougas*. The meaning of those terms, therefore, should be applied to § 1348, with the result that a national bank must be deemed a citizen of every state in which it operates a branch office.

II. EVEN IF THE STATUTE IS CONSIDERED TO BE AMBIGUOUS, THE LEGISLATIVE HISTORY DEMONSTRATES THAT A NATIONAL BANK MAY BE DEEMED A CITIZEN IN ANY STATE IN WHICH IT OPERATES A BRANCH OFFICE.

A. The Early Statutes Used The Words "Established" And "Located" Differently.

The legislative history supports the conclusion that a national bank may be a citizen of any state where it maintains a branch office. The Petitioner and the Amicus both argue that the historical development of

the term "located" in the statute shows that it was intended to mean the same thing as "established." In fact, the legislative history reflects that the word "located" was never meant to mean "established." Indeed, the legislative history shows that the word "located" contains connotations of "doing business."

When Congress set up national banks in 1863, (12 Stat. 681 § 59(c)), it allowed suits in federal courts, "within the district in which the association was established," with no mention of suits in state court. *See Bougas,* 434 U.S. at 41. This was corrected when the National Banking Act was replaced with a new Act in 1864, 13 Stat. 99. ch. 106, which in § 57 carried forward former § 59, but also added the provision that suit may be had "in any state, county, or municipal court in the county or city in which said association is located, having jurisdiction in similar cases."

In that form, that section of the Act survived in nearly unchanged language to become the venue statute which the Court analyzed in *Bougas*. Although it is true that the provision in the current § 1348 employing the word "established" came from a different act dealing with federal question jurisdiction, it is undisputed that both "established" and "located" were used by Congress in the same section of the 1864 Act. Moreover, as discussed, in *Petri, supra,* the 1864 Act was not merely a venue statute. That Court treated the 1864 Act as jurisdictional. *Id.* at 647. The 1864 Act also used the word "located" a second time in the same section, in a clause requiring proceedings to enjoin the comptroller to be had in a federal court. This paragraph appears to be the direct precursor to 28

U.S.C. § 1394. Thus, the original statute used the words "established" and "located" differently.

Next, in 1882, in a provision similarly dealing with jurisdiction, the word "established" is used again, but the word "located" is not. Instead, the statute employs the phrase "doing business" to designate where jurisdiction may lie in actions by or against a national bank. The Act provided,

> That the jurisdiction for suits hereafter brought by or against any association *established* under any law providing for national banking associations . . . shall be the same as, and not other than, the jurisdiction for suits by or against banks not organized under any law of the United States which do or might do banking business where such national banking associations may be *doing business* when such suits may be begun . .

Act of July 12, 1882, 22 Stat. 162, c. 290 (emphasis added) (quoted in *Petri, supra* at 645). Thus, the 1882 Act states that jurisdiction over a national bank, established under the laws of the United States, shall be the same as jurisdiction over state banks "where such national banking associations may be *doing business*." *Id*. (emphasis added). Significantly, the 1882 Act mentioned that national banks are "established" under the laws of the United States, but declined to use that same word as the basis for applying diversity jurisdiction. Instead, the 1882 Act set up diversity

jurisdiction over national banks on the basis of where the national bank was "doing business."

The phrase "doing business" was later replaced with the word "located" in the 1887 Act, which provided as follows:

> Sec. 4 That all national banking associations *established* under the laws of the United States shall, for purposes of all actions by or against them, real, personal, or mixed, and all suits in equity, be deemed citizens of the States in which they are respectively *located* . . . .

Thus, the word "located" in the 1887 Act follows directly upon and replaces the previous 1882 Act's use of the phrase "doing business." This strongly suggests that where a national bank is "located" in the 1887 Act was meant to be defined as where a national bank is "doing business."

That suggestion is reinforced by this Court's comments in *Herrmann v. Edwards*, 238 U.S. 107 (1915), in which the Court stated that the 1887 Act was "but the re-enactment of an identical provision contained in the 4th section of the Act of July 12, 1882 (chap. 290, 22 Stat. at L. 162, Comp. Stat. 1913, § 9665)." *Id*. at 111. The *Herrmann* Court, thus, reinforced the identity of the word "located" in the 1887 Act with the term "doing business" in the 1882 Act. This is further shown by the *Herrmann* Court's pointing out that the bank involved in that case was "established and carrying on business" in the city where the case arose.

Id. at 114. The early statutes, then, not only treated "located" differently from "established," but the legislative history shows that the 1887 Act's use of the word "located," in a parallel way to the use of the term "doing business" in the 1882 Act, gives "located" at least the connotation of where a national bank may be doing business.

B. The Meaning Of These Two Terms Continued Into The Present Statute.

It is undisputed that the language of the current § 1348 was derived from the 1887 Act. Thus, the difference between "established" and "located" is carried forward to the present § 1348. Also carried forward is the meaning of "located" as colored by the phrase "doing business."

Nevertheless, the Petitioner argues that the use of the word "established" in the 1882 and 1887 Acts is unimportant to an understanding of the use of the same word in the current § 1348. The Petitioner says that the early statutes did not use the word in a "locational sense." (Petitioner's Brief, p. 33-34). That is correct, just as the Fourth Circuit below concluded that "established" does not mean "located." The Petitioner then goes on to assert that the word "established" in the original statutes "served quite a different purpose: it referred to "national banking associations *established* under the laws of the United States . . . ." (Petitioner's Brief, p. 34, n. 16). The Petitioner presumes this is different from how the word is used in the current statute as "a national banking association *established* in the district for which the court is held." The

Petitioner's assertion that the use of the word "established" in the current statute is somehow different from its use in the original statutes is undercut by the fact, as the Petitioner also points out, that this change from the original wording in the 1882 and 1887 Acts to the 1911 codification was "not intended to effect any substantive change in the law." (Petitioner's Brief, p. 18) (citing *Federal Intermediate Credit Bank at Columbia S.C. v. Mitchell*, 277 U.S. 213, 216 (1928); *Herrmann, supra*, 238 U.S. at 117-18). Thus, "established" was never used by Congress in a "locational sense," up to and including its use in current § 1348.

In the 1911 codification, the paragraph dealing with the federal question jurisdiction over national banks in suits against the comptroller, for example, was added to the paragraph dealing with diversity jurisdiction from the Act of 1887. At that point, the 1911 codification produced the language substantially equal to the current § 1348. The fact that the codification of 1911 was not meant to change the meaning of the 1882 and 1887 enactments indicates further that the connotation of "doing business" in the word "located" carries through to the current statute. The legislative history, then, supports the conclusion that "located" means something other than "established." In addition, the "doing business" connotation of the word "located" is carried forward into the current statute.

C. The Opinion Of The Court Of Appeals Below Was Not Mistaken Concerning The Possibility Of Interstate Branch Banks.

The legislative history of the statute simply does not suggest that Congress was unaware of the possibility of interstate branch banking. The Petitioner criticizes the opinion of the court of appeals below for saying that branch banking was permitted before the enactment in 1948 of § 1348. This criticism itself is misplaced. That interstate branch banking was possible before 1994, was demonstrated in the *American Surety* case in which a state bank that had operated interstate branches converted into a national bank. *American Surety Co. v. Bank of California*, 133 F.2d 160 (9th Cir. 1943). Moreover, in *Bougas*, the argument was advanced that national banks were not allowed to engage in any branch banking until 1927 when the McFadden Act, 44 Stat. Pt 2, p. 1224, was passed. In 1933, amending the McFadden Act, Congress permitted national bank branches beyond the place of the charter, though still limited to in-state branches. The *Bougas* Court was urged to conclude, given the fact that branch banks were not permitted when the venue statute was written, that Congress could not have intended "located," as used in the venue statute, to include branch banks. The Court responded, saying "We need not travel that far analytically in determining congressional intent." *Bougas*, 434 U.S. at 43.

> Throughout this early period, the words "established" and "located" led to the same ultimate venue result.

> Nevertheless, the two words are different. One must concede that a federal judicial district, which the statute associates with the word "established," is not the same as the geographical area that delineates the jurisdiction of a state court, which the statute associates with "located."

Bougas, 434 U.S. at 43-44. Thus, the Court dismissed this argument, relying instead on the simple meaning of the words as they were used in the statute.

In addition, the early banking laws permitted a state bank to keep its branch offices when it converted to, or merged with, a national bank. Act of Mar. 3, 1865, ch. 78, § 7, 13 Stat. 459; Revised Statutes of 1875, 18 Stat. 1, 996, & 1003, § 5155. It may be true that interstate branch banking was not in the forefront of congressional concern. To say, however, that Congress could not have had the possibility of branch banks in mind when it enacted § 1348 is inaccurate. The fact that interstate branch banking was not widespread does not mean that Congress must have meant § 1348 to limit a national bank's citizenship to a single State.

D. The Doctrine Of "Jurisdictional Parity" Does Not Require That National Banks Must Be Deemed Citizens Of Only One State.

The Petitioner argues the statutory history shows intent to promote a policy of "jurisdictional parity." Jurisdictional parity refers to the policy of

having national banks and state banks subject to the same jurisdictional rules. As discussed above, the 1863 National Banking Act permitted broad federal question jurisdiction, such that a suit involving a national bank would necessarily trigger federal question jurisdiction because of the federal nature of the bank's character. *See also Petri, supra,* 142 U.S. at 648.

That broad federal question jurisdiction was largely eliminated in the 1882 Act. Addressing that Act in *Leather Manufacturers' Nat. Bank v. Cooper*, 120 U.S. 778 (1887), the Court said it was "evidently intended to put national banks on the same footing as the banks of the State where they were located for all the purposes of the jurisdiction of the courts of the United States." *Id*. at 780. Similarly, in *Mercantile Nat'l Bank at Dallas v. Langdeau*, 371 U.S. 555 (1963), putting off an argument that the 1882 and 1887 Acts altered venue over national banks, the Court stated that the 1882 and 1887 Acts were designed simply to remove federal question jurisdiction based on a national bank's federal charter. The Court said those Acts "apparently sought to limit, with exceptions, the access of national banks to, and their suability in, the federal courts to the same extent to which non-national banks are so limited." *Id*. at 566.

The Court also discussed this point in *Petri*, saying that the 1882 Act sharply curtailed the federal question jurisdiction. The Court emphasized that the purpose of the statute was to remove broad federal question jurisdiction over cases involving national banks, leaving them subject to the same rules of diversity jurisdiction that are applicable to corporations or individuals. *Petri, supra*, 142 U.S. at

648-49 ("remained unchanged"). In *Petri*, the Court concluded that "there is no reason why Congress intended national banks should not resort to federal courts as corporations and individual citizens might do." *Id*. at 651. The *Petri* Court explained,

> that is to say, that the Federal courts should not have jurisdiction by reason of the subject matter other than they would have in cases between individual citizens of the same State, and so not have jurisdiction because of the Federal origin of the bank.

Id. Thus, the purpose was simply to remove the federal question jurisdiction, and nothing more. The policy goes no further than to leave in place the rules of diversity jurisdiction to apply after removing federal question jurisdiction. As the Court in *Continental Nat'l Bank of Memphis v. Buford*, 191 U.S. 119, 123-24 (1903), pointed out, referring to the removal of federal question jurisdiction, "[n]o other purpose [of the 1882 Act] can be imputed to Congress than to effect that result."

In particular, nothing in these opinions shows a further implication that the same test of citizenship was to be applied to national banks as to corporations. Nevertheless, the Petitioner effectively urges not a jurisdictional parity, but a parity of citizenship, saying that "[t]his principle of jurisdictional parity compels the conclusion that national banks must be treated as citizens of only a single state." (Petitioner's Brief, p. 20). This follows, the Petitioner contends, from the rule

that corporations were treated as citizens only of the State of their incorporation, and that Congress must have had this rule in mind when enacting jurisdiction over national banks. (Petitioner's Brief, p. 20-21).

The difficulty with this argument is that the language dealing with jurisdiction over corporations and the language dealing with jurisdiction over national banks has never been the same. As the Petitioner points out, a corporation was always a citizen where it was incorporated, and more recently, under § 1332, where it has its principal place of business. By contrast, a national bank was always deemed a citizen where it was located.

Moreover, the Petitioner's argument completely fails when it is considered that a corporation may be incorporated in more than one state, and will be deemed a citizen of every state in which it is incorporated. *Louisville New Albany & Chicago Ry. Co., supra* 174 U.S. at 562 This has been specifically held to limit diversity jurisdiction. *Panalpina Welttransport GMBH, supra*, 764 F.2d at 354. Thus, nothing in the law of diversity jurisdiction over corporations suggests that a national bank may not be deemed a citizen of more than one state. Assuming, then, that jurisdictional parity requires the same rules of citizenship must be applied to national banks as are applied to corporations, that assumption does not limit a national bank's citizenship to a single state.

E. A Policy Of "Equality Of Competition" Does Not Require That National Banks Must Be Deemed Citizens Of Only One State.

In addition to "jurisdictional parity," the Petitioner asserts that the ruling of the court of appeals below is contrary to the policy of the banking laws to provide "equality of competition" between state banks and national banks. The Petitioner cites several cases in which the Court has recognized this as one of the goals of the banking statutes. In *First National Bank in Plant City v. Dickinson*, 396 U.S. 122 (1969), the Court stated that "Congress has deliberately settled on a policy intended to foster 'competitive equality.'" *Id*. at 131 (citing *First National Bank of Logan v. Walker Bank*, 385 U.S. 252, 261 (1966)).

In *Lewis v. Fidelity & Deposit Co. of Maryland*, 292 U.S. 559 (1934), cited by the Petitioner, the court held that national banks should be subject to a general lien upon their assets, just as state banks were. According to the Court, the "main purpose of the 1930 [banking] act was to equalize the position of national and state banks." *Id*. at 564. The goal was to provide "equality . . . in competing for deposits." *Id*. The Court went on to point out that the policy is expressed in provisions conferring power to establish branches; in those conferring power to act as fiduciary; in those concerning interest on deposits; and in those concerning capitalization as well as the power to loan on a mortgage. *Id*. at 565.

Significantly, these are all matters of banking business, indicating that the policy involves equalizing competition in business practices. Nothing suggests that it involves insuring equal results in the application of legal procedures. In fact, another portion of that opinion suggests the opposite. When asked to allow the imposition of the liens on the national bank because of a potential conflict between state and federal law, the Court declined to rule on this potential inequality, since the state law had never been applied, leaving no "occasion for complaint." *Id*. at 567. Thus, the Court demonstrated that equality of competition concerns fairness in business practices or opportunities, rather than a strictly equal application of legal procedures. This also follows from the fact that the policy of competitive equality is derived from the banking statutes dealing with banking operations and not from the jurisdictional statutes.

In the other cases cited by the Petitioner on "equality of competition," the Court also applied the policy to business practices. In *Walker Bank*, *supra*, the Court held that national banks could take over existing branch banks, just as state banks were permitted to do. Of course, the ability to operate branch banks is a business, rather than a legal advantage. Similarly, in *Dickinson*, *supra*, the Court held that a national bank could not operate off-premises banking services in Florida where state banks were not permitted to offer similar customer services. Thus, nothing in these cases indicates that the policy of competitive equality must extend to the application of the legal rules of diversity jurisdiction. As with the argument concerning "jurisdictional parity," the Petitioner overstates the

policy. Competitive equality is meant to promote equal opportunity in business practices. It is not meant to guarantee equal procedural results or rules in the courts.

Furthermore, the argument that "equality of competition" must require that a national bank be considered a citizen of a state in the same fashion as a state bank, contains three fatal assumptions. It assumes, first, that a state court will be prejudiced against a branch office of a national bank, headquartered in another state. While the purpose underlying diversity jurisdiction is to avoid any prejudice in a local court against a foreign party, that concern can hardly be said to exist where the "foreign" party operates branch offices in the forum state, in potentially greater numbers and, thus, with a greater presence, than local banks.

The Petitioner's argument also assumes that being denied jurisdiction in federal court will somehow place a party at a disadvantage. Any dispute, however, could be resolved in the state courts. To maintain that a denial of jurisdiction in the federal court imposes a competitive disadvantage would be to presume that a state court is incapable of rendering justice between the parties. Viewed another way, by suggesting that a party must be allowed to choose between different courts, the claim that competitive equality cannot be achieved without jurisdiction in both federal and state courts is to suggest a right to forum shopping. Competitive equality could not have been meant to achieve such ends.

Third, even if equality of competition between national and state banks were meant to apply to issues of court procedure, the position urged by the Petitioner would not fully achieve that policy. If the Petitioner's interpretation of the statute were adopted, an out-of-state national bank would not be considered a citizen of South Carolina. In a suit brought by an individual resident of South Carolina, a federal court would be able to exercise diversity jurisdiction over that national bank. That same action, however, could not be maintained over a state bank chartered in South Carolina, even though the national bank may be operating as many or more branch offices in South Carolina as the state bank. Such a disparate result could hardly be called competitive equality, even under the Petitioner's interpretation.

F. The Re-enactment Of The Statute After A Single Court Decision Does Not Require A Conclusion That Congress Meant To Incorporate The Holding Of That Case.

The Petitioner argues that the word "located" cannot be meant to include branch banks, because, when § 1348 was enacted in 1948, Congress must have intended to incorporate into the statute a judicial decision on the meaning of that term. In the case of *American Surety Co.*, *supra*, the Ninth Circuit Court of Appeals held that a bank's acquisition of a branch office in another state did not establish citizenship in that state. That case was decided in 1943. The Petitioner argues this holding must have been intended

by Congress to inform the meaning of § 1348 when it was enacted five years later, in 1948.

This is a misapplication of the rule of construction because the rule requires that the judicial or administrative interpretations have been consistent and settled. For its argument, the Petitioner cites *Lorrilard v. Pons*, 434 U.S. 575 (1978). In that case, the Court addressed a statute re-enacted after it had been consistently interpreted over a long period by an administrative agency. The Court even noted that every court which had addressed the issue under consideration there came to the same conclusion. *Id*. at 580, n. 7. Moreover, the same was true in the cases cited in *Lorillard* for the rule of construction. In *NLRB v. Gullett Gin Co., Inc*., 340 U.S. 361 (1951), the administrative agency had applied a consistent practice which the statute was deemed to have adopted. The Court also pointed out that the agency's practice had been challenged in only two cases and had been upheld in both. In addition, the legislative history disclosed that the agency's practice was considered in detail during the congressional deliberations. *Id*. at 366. Similarly, in *Albemarle Paper Co. v. Moody*, 422 U.S. 405, 414, n. 8 (1975), the Court stressed that the courts of appeal were "unanimous" in their treatment of the matter which was addressed in the re-enactment of the statute.

In such circumstances, the Court did not need to make a careful statement of the rule of construction. The better statement of the rule was given in the final case cited in *Lorillard*. In *National Lead Co., v. United States*, 252 U.S. 140 (1920), the Court pointed out that

an administrative interpretation of a statute will be given great weight where the agency's interpretation had been applied for many years. This is in line with more recent statements of the rule that the re-enactment of a statute, which has been given a consistent judicial interpretation, is generally presumed to include that settled judicial interpretation. *Pierce v. Underwood*, 487 U.S. 552 (1988); *Central Bank of Denver, N.A. v. First Interstate Bank of Denver, N.A.*, 511 U.S. 164 (1994); *Bragdon v. Abbott*, 524 U.S. 624 (1998) (settled meaning).

The law in the case at hand, however, was not "settled" merely by the single case when § 1348 was enacted in 1948. There was nothing "consistent" about that interpretation at that time, when no other court had ruled on the issue. Moreover, over the years since 1948, the meaning of "located" could hardly be called "settled," when the lower courts have sharply divided on the question.[5]

What certainly was consistent, however, was the language used by Congress concerning diversity jurisdiction for national banks as opposed to corporations. Throughout the history of § 1348 and § 1332, Congress applied very different language to diversity jurisdiction over national banks from the language applied to diversity jurisdiction over

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[5] *See e.g. Firstar Bank N.A. v. Faul*, 253 F.3d 982 (7th Cir. 2001) (holding that "located" does not include branch banks); *World Trade Center Properties, LLC v. Hartford Fire Ins. Co.,* 345 F.3d 154 (2nd Cir. 2003) (national bank is citizen of "every state it has offices"); *Frontier Ins. Co. v. MTN Owner Trust*, 111 F. Supp. 2d 376 (S.D.N.Y. 2000) ("located" includes branch banking offices).

corporations, deeming banks to be citizens of the states where they are located, while deeming corporations to be citizens of the states where they are chartered or have their principal place of business. In this regard, it is also significant that the 1948 legislation was not made in response to the *American Surety* case. Rather, it was a broad enactment of procedural provisions covering many subjects.

This raises a key distinguishing characteristic of the *American Surety* case. The court of appeals reached its conclusion in that case on the basis of its belief that "[t]here would appear to be a close analogy between [a national] bank and a corporation national in scope." *American Surety*, *supra*, 133 F.2d at 162. The Ninth Circuit's presupposition of an analogy between corporations and national banks was undermined by the very different treatment Congress accorded corporations as opposed to national banks. The fact that such different treatment was reiterated in the 1948 statute, even after the *American Surety* decision, reinforces the conclusion that Congress did not impliedly adopt the holding of that case.

The Petitioner argues that, before 1994, it was nearly unheard of for a bank, whether state-chartered or national, to operate a branch office across state lines. The Petitioner asserts this point as proof that Congress could never have meant the word "located" to have applied to inter-state branch banks. Now, by saying that the *American Surety* case must be read into § 1348, the Petitioner is making the opposite argument, that Congress must have fully contemplated the possibility of interstate branch banks because of one lone instance

in which that situation arose. The fact that interstate branch banking was so rare in 1948, when the statute was enacted in its present form, indicates that this possibility was not a significant factor in the congressional intent. In any event, the specific and direct treatment of the terms in the actual statutes dealing with jurisdiction over national banks as opposed to corporations, and dealing with venue as opposed to jurisdiction over national banks, is a better measure of congressional intent than a vague and general analogy between corporations and national banks.

G. The Concept Of Citizenship Does Not Require A National Bank To Be Deemed A Citizen Of Only One State.

In its Amicus Brief, The Comptroller approaches the case with an argument about the meaning of citizenship. The Comptroller insists that citizenship is limited to one place. (Amicus Brief, p. 14-15). Therefore, the argument goes, § 1348 must imply that a national bank can be deemed to be a citizen only of one state. Although the Comptroller's discussion of the broad outlines of citizenship of individuals and corporations is illuminating, it fails to mention that corporations may have multiple citizenship. Section 1332 explicitly recognizes that citizenship for corporations is not limited to a single state. Moreover, as discussed above, the courts have long and consistently held that a corporation will be deemed a citizen of every state in which it is incorporated. This is also true in many other business organizations. In limited partnerships, for example, diversity must be

established with reference not only to the general partners, but to all partners. *Carden v. Arkoma Associates*, 494 U.S. 185 (1990). Similarly, a limited liability company shares the citizenship of all its members. *GMAC Commercial Credit LLC v. Dillard Dept. Stores, Inc.*, 357 F.3d 827 (8th Cir. 2004); *Belleville Catering Co. v. Champaign Market Place, L.L.C.*, 350 F.3d 691 (7th Cir. 2003); *Rolling Greens MHP, L.P. v. Comcast SCH Holding L.L.C.*, 374 F.3d 1020 (11th Cir. 2004). Even with regard to banks, there is no practical limitation to multiple citizenship. It appears, for example, from an examination of the public records of the offices of the Secretary of State for North Carolina and the Secretary of State for South Carolina, that the predecessor of the Petitioner (First Union Corporation) actually operated separate banking companies in each of those states, as First Union Corporation of North Carolina and First Union Corporation of South Carolina.

The Comptroller asserts that "[a]s with natural persons, the fact that a corporation of one State maintains a physical presence in another State does not render it a citizen of the latter State." (Amicus Brief, p 15). Presumably, this means that a national bank, by analogy, does not acquire citizenship in every state where it operates a branch office, and that a national bank can be deemed a citizen only of a state designated in its organizational certificate, just as a corporation will be deemed a citizen of a state where it is incorporated.

Such an analogy breaks down, however, when the differences between the two statutes are

considered. Section 1332 expressly speaks in terms of where the corporation is incorporated, and limits citizenship based on the corporation's physical presence to where its principal place of business is maintained. Section 1348, however, speaks in terms of where the national bank is located. It contains no reference to the bank's organizational certificate. To be sure, with regard to a national bank's physical presence, the statute does not attach any limiting language to the word "located." Indeed, considering the connotation of "doing business," which the word "located" carries from its early statutory history, the only physical presence requirement on a national bank under § 1348 is whether it is doing business. In any event, § 1348 contains nothing like the express limitation in § 1332 concerning a corporation's principal place of business.

CONCLUSION

For these reasons, the judgment of the United States Court of Appeals for the Fourth Circuit should be affirmed, and the case dismissed.

Respectfully submitted,

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In The
Supreme Court of the United States

No. _____

WACHOVIA BANK, NATIONAL ASSOCIATION,

Petitioner,

v.

DANIEL G. SCHMIDT, III, *et al.*,

Respondents.

AFFIDAVIT OF SERVICE

I, Justin March, of lawful age, being duly sworn, upon my oath state that I did, on the 13th day of October, 2005, file via hand delivery, to the Clerk's Office of the Supreme Court of the United States forty (40) copies of this Brief on the Merit, and further sent via UPS Next Day Air, three (3) copies of the Petition for Writ of Certiorari with Appendix to:

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